

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

**UNITED STATES' MOTION FOR PRETRIAL RULING ON
ADMISSIBILITY OF PLEA AGREEMENT**

I. Introduction

The United States hereby moves for a pretrial ruling on the admissibility of prosecution witness Kenneth Rains' plea agreement.¹ As explained below, the plea agreement is admissible because it is relevant to help the jury assess Rains' credibility and to show that Rains has firsthand knowledge of the Defendants' participation in the crimes charged in this case. For these same reasons, the United States also seeks permission to mention briefly Rains' guilty plea in opening and closing statements and to question Rains about his plea agreement during direct examination.

¹Attached as Exhibit A.

II. Factual Background

The Defendants are charged with conspiring to rig bids in violation of the Sherman Act, 15 U.S.C. § 1. The conspiracy involved the Defendants and a coconspirator named Kenneth Rains, who acted on behalf of his company, Flint Energy Services, Inc. Both Rains and Flint Energy Services, Inc., were charged for their role in the conspiracy and have pled guilty under plea agreements with the United States. At trial, the United States intends to call Rains to testify about the conspiracy. The United States wishes to introduce Rains' plea agreement "to enable the jury to assess [Mr. Rains'] credibility in light of his relationship with the government" and "to explain [Mr. Rains'] firsthand knowledge of Defendant[s'] participation in the conspiracy." *See United States v. Blanco-Rodriguez*, No. 98-2116, 1999 WL 100905, at *4 (10th Cir. Mar. 1, 1999) (unpublished)²; *accord United States v. Whitney*, 229 F.3d 1296, 1304 (10th Cir. 2000); *see also United States v. Morgan*, No. 91-3169, 1992 WL 37334 (10th Cir. Feb. 25, 1992) (unpublished)³ ("the plea may be admitted if the codefendant testifies and if the plea is used only to impeach or enhance the codefendant's credibility"). In addition, the United States seeks to introduce Rains' plea agreement to prevent the jury from being surprised if the Defendants attempt to impeach Rains' credibility by mentioning the benefits he may receive under the plea agreement. *See Fed. R. Evid. 607* ("The credibility of a witness may be attacked by any party, including the party calling the witness.").

III. Argument

²Attached as Exhibit B.

³Attached as Exhibit C.

A coconspirator's guilty plea may not be used as "substantive evidence of a defendant's guilt." *Blanco-Rodriguez*, 1999 WL 100905, at *4. However, when a defendant's coconspirator testifies, the United States "may elicit evidence of a guilty plea for the jury to consider in assessing the [coconspirator's] credibility as a witness," *United States v. Pedraza*, 27 F.3d 1515, (10th Cir. 1994) (quoting *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983)) (alteration in original), or to explain the coconspirator's "firsthand knowledge" of the conspiracy, *Whitney*, 229 F.3d at 1304 (quoting *United States v. Davis*, 766 F.2d 1452, 1456 (10th Cir. 1985)); *Blanco-Rodriguez*, 1999 WL 100905, at *4. Here, the United States wishes to introduce Rains' plea agreement for both reasons, and it is appropriate to do so provided that the Court cautions the jury to consider the guilty plea only for these reasons and not as substantive evidence of the Defendants' guilt. *See Whitney*, 229 F.3d at 1304. In addition, for these same reasons, it is appropriate for the United States to question Rains about his plea agreement and to mention briefly in opening and closing arguments that Rains has pled guilty to rigging bids.

IV. Conclusion

Accordingly, the Court should admit into evidence the plea agreement of Kenneth Rains, allow the United States to question Rains about the agreement, and allow the United States to mention that Rains pled guilty briefly in opening and closing statements.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2007, I electronically filed the foregoing United States' Motion for Pretrial Ruling on Admissibility of Plea Agreement with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

s/Diane C. Lotko-Baker

DIANE C. LOTKO-BAKER

s/Carla M. Stern

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